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# UK Constitutional Law Association

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## Stephen Tierney: Solomon Grundy Does Constitutional Change: The Smith Commission Timetable to Transform the Scottish Parliament



In the month of November the Smith Commission is set to draw up the most significant programme of constitutional change for the United Kingdom since 1998. Already the period within which citizens could submit their views on this process has passed; the Commission having set a deadline of 5 p.m. on 31 October.

Such a rapid process runs counter to both the due diligence that is surely needed before any decision is taken to restructure the UK tax (and possibly welfare) systems so radically and the due process which ought to accompany such a seminal constitutional development. Unfortunately the principles of deliberative

constitutional decision-making and popular democratic engagement which figured strongly in the recent independence referendum are unlikely to gain much traction in the current rush to change.

The referendum campaign was indeed a remarkable period of citizen empowerment. The turnout of 84.7% is only one dimension of this; in a deeper way many citizens were greatly invigorated by the referendum and the role they had in discussing and ultimately in making such a huge decision. The Smith Commission process, by contrast, bears all the hallmarks of a return to elite-led constitutional change; and it is deeply ironic that the impetus for such a rapid and party-led process should be the independence referendum itself. As the 18<sup>th</sup> of September approached and the polls seemed to tighten, the leaders of the main unionist parties issued 'The Vow', promising more powers for the Scottish Parliament and setting out a firm timetable for change.

The day after the referendum Prime Minister Cameron announced that Lord Smith of Kelvin would oversee a process to take forward these commitments, and Lord Smith announced details of the Commission only four days later, on 23 September. The five main parties (Conservative, Greens, Labour, Liberal Democrats and SNP) each appointed two members to the Committee and they rapidly formulated their individual submissions to it (each party had submitted its views by 10 October). On 3 October the public and civil society were invited to give their views, all to be done by the end of that month. This leaves only one month for the Commission to consider all of this material and to produce a cross-party Heads of Agreement by 30 November, with a view to a new draft Scotland Bill by 25 January. This is an astonishingly speedy programme. The UK constitution which has evolved slowly over centuries now faces a potentially open-ended overhaul by means of a Solomon Grundy timetable.

My first set of objections are less of principle and more of prudence. Due diligence surely demands a thorough process to assess the practicalities and implications of changes that pose very real

challenges to the UK's economic and financial integrity. It is not enough to make policy decisions and then complete an assessment of how these can best be operationalised later; the operational difficulties which present themselves in a practical review of their feasibility are themselves crucial in informing policy in the first place. The devolution of extensive tax and welfare competences within such a highly integrated state requires to be tested for their impact both on Scotland and on the rest of the UK. Tax powers were extended to Scotland by way of the Scotland Act 2012 following a much longer and more detailed review. The Calman Commission met for a year and its proposals were extensively debated in both the Westminster and Holyrood parliaments. Even then, the most important tax powers enacted in 2012 (which will in all likelihood pale into insignificance in light of the Smith recommendations) will not be in place until 2016.

The Smith timetable is also odd given that we are heading towards a UK general election. Indeed the plan is to put the Smith proposals on hold after initial agreement is reached and draft legislation prepared, with legislative implementation intended to follow after the election. But surely it makes sense to wait until the election is over before even the decisions of principle are reached. The Smith Commission is of course the result of the political commitment made in The Vow, and for political reasons the parties feel the need to move fast. But this does not seem to be a prudent or a principled way to make such huge decisions. The general election provides an entirely credible reason to set deliberation back until next year. By any measure it is better to do things correctly than to do them quickly. Instead we will have a hastily produced policy decision made by party bartering; the subsequent legislative process will serve merely to implement rather than fully deliberate on the wisdom of the proposed reforms.

And then there is the issue of due process. As a point of democratic principle fundamental constitutional change should be open, inclusive and deliberative if the people of Scotland, and more pertinently the people of the rest of the UK, are to consider it legitimate. This is no small matter. Regardless of how popular the changes prove to be or how well they work in practice, the health of democracy depends as much, if not more, upon the propriety and legitimacy of the process by which they are effected.

The bigger picture is of course the UK constitution as a whole. The Smith Commission is concerned only with additional powers for the Scottish Parliament. But is it feasible to address this issue alone without also considering the knock-on consequences for the entire country? For example, one element of The Vow was to make the Scottish Parliament 'permanent', but how could such a constitutional guarantee be made without significant changes to parliamentary sovereignty, the very basis of the British constitution?

More broadly, we were told that further devolution could not be an option on the referendum ballot paper because it was a UK-wide issue, and yet here we are. Already the West Lothian Question has re-appeared as a counterpoint to more powers for Scotland. Should decisions be taken on radical tax powers for Scotland without advance notice of whether, and if so how, these powers may lead to a significant loss of influence for Scotland at Westminster? We also don't know if this process might prompt a strong campaign for an English Parliament within the UK system, further devolution for Wales and Northern Ireland, a re-worked system of intergovernmental relations, potential issues of compatibility with European Union law (something which Smith says it will address), and even moves to some kind of quasi-federal system, possibly involving a realignment of the House of Lords as a chamber of the nations and regions of the UK, a point raised by Ed Miliband in his speech to the Labour Party conference in September 2014. Scots should know whether the price of more powers will be a radically new constitutional structure within which the position of Scotland is in some ways marginalised. Instead, the Smith Commission in its media statement of 22 October, its last before it went into lockdown to produce its final proposals, asserts both that its proposals should '[n]ot be conditional on the conclusion of other political negotiations elsewhere in the UK', and '[n]ot cause detriment to the UK as a whole nor to any of its constituent parts'. There is simply no guarantee that

such a unilateral process will not have detrimental consequences for the UK as a whole or its constituent parts, including Scotland itself.

Given the importance of the issues at stake, what then of the democratic credibility of the process? Does the Smith Commission really offer scope for proper deliberation at either elite or popular levels? Deliberative democracy remains a recent and developing turn in political theory, but if we are to try to identify a principle that unites deliberative theorists across a very wide spectrum of differing approaches it is that decision-making is best made in an open and reflective manner, where participants listen as well as speak, and in doing so are amenable to changing their positions.

It is not impossible for the Smith Commission to conduct itself in such a way but the fact that its membership is open only to political parties and the limited time it has been set to reach an outcome makes reflexive deliberation very difficult. Indeed, when we see the proposals submitted to Smith they are largely the well-established positions of the political parties and not the result of any independent or cross-party review. There will of course be give and take in a process of inter-party bartering, but is this the type of democratic deliberation to which post-referendum Scotland aspires?

All of this suggests the need for restraint; for the two governments to set up a much more inclusive and wider-ranging review over a much longer period of time which can be conducted in a more independent way, relatively free from party political horse-trading. Such a process would be able to take the views of many people across civil society as well as assess the interests which are likely to be affected by the devolution of extensive tax and welfare powers; it would also consider the full implications of such changes for the UK as a whole.

In light of this recent experience why not see the referendum as the first step in a new endorsement of popular politics? The post-referendum environment offers the chance to re-engage with a public which is better educated about, engaged with and enthused by constitutional politics than ever before. There have been many experiments in popular deliberation across the world in recent years which have served to give people a meaningful say both in framing major constitutional issues and in making decisions upon these issues directly. To step back and explore such avenues would be no retreat from the democratic will of the people; on the contrary, such an engagement would help fulfil the democratic promise of the referendum.

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## 5 comments on "Stephen Tierney: Solomon Grundy Does Constitutional Change: The Smith Commission Timetable to Transform the Scottish Parliament"

Tom  
November 4, 2014



Maybe its deliberately crap just to satisfy the vow, and wont end up having any importance but the time there's proper movement and time to deliberate after the election. Maybe it's a short term political fop, no more?

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